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THE DISTINCTION BETWEEN LEGISLATIVE
AND JUDICIAL POWER.

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The eager study of early institutions, which is a marked characteristic of the last two or three decades, has made it clear that at one time all the functions of government were exercised by what was primarily a council of war, composed of chief, head-men and people. Legislation consisted merely in agreeing on certain resolutions which the legislators themselves were forthwith to carry into effect. If a man was not strong enough to avenge his private injuries himself, his grievances were heard and redressed by the whole assembly; but fighting in Court was only slowly developed as a substitute for fighting in the field.¹ Such a form of government would obviously meet the needs of only a very primitive community. Everywhere some one of the three elements of the council gained power at the expense of the others, and the government tended accordingly toward monarchy, oligarchy, or democracy. In England

¹ See, for example, Spencer, *Political Institutions*, Ch. XIII; Maine, *Early History of Institutions*. Lect. IX and X.

the monarchic tendency prevailed. The king became not only the maker and enforcer of the laws, but the fountain of justice as well. He was himself the judge, and his "court" was wherever he was. But this concentration of power became in turn unsuited to the times; despotism became less necessary, and the increasing complexity of interests rendered it impossible for the most benevolent despot to do what was required. The former tendency was reversed, and from the days of King JOHN the struggle of head-men and people to recover their lost share in the government has met with increasing success. The head-men first, and afterward the people, have gained the upper hand, and have at last made England a democracy.

It seems now very obvious that the remedy at once for the despotism and for the overwhelming accumulation of business was a division of labor. And so it was gradually worked out. The nobles insisted first that they have a hand in passing tax laws, and that the king should not inflict punishment by his arbitrary fiat, but by the regular administration of law in the courts. These things being conceded, they were able to enforce their demands for an ever-increasing share in the legislative power. The people began to demand representation in this law-making body, and, once admitted, they have usurped the whole power. The veto was the last remnant of the king's legislative power, and it is gone. The House of Lords steadily lost power, and, at least since they rejected the Reform Bill and then "backed down" under the popular displeasure, their share in legislation has been a wholly subordinate one. The legislative power in England is in the House of Commons. The disallowance of the king's claim to act in person as judge was followed by a denial of his right to appoint the judges to hold at his pleasure merely. Then tenure during good behavior was supplemented by security of income, and the judiciary was independent except for the king's power of appointment and of pardon and the Commons' power of impeachment. Yet when MONTESQUIEU, from his study of the English government before the evolution had progressed quite so far, drew the conclusion that legislative,

executive and judicial powers ought not to be in the same hands,¹ it struck even Englishmen as a remarkable and important discovery in the science of government. He, if not in fact the first to distinctly apprehend this as the essential characteristic of the British Constitution, was emphatically the man who gave it vogue,² and in America his *Spirit of Laws* was a very gospel of politics in the last half of the eighteenth century.

This brief allusion to a very long process will serve at least to suggest where the maxim concerning the division of the powers of government came from, and so prepare the way for finding out what it means. In the first place, it appears that it has resulted from a slow analysis and differentiation of a congeries of powers once wholly unclassified and not even recognized as having distinctive characteristics. There is no ground for assuming that the differentiation is complete, or for expecting to find the distinctions so clearly drawn that every function of government can be assigned to its place in the scheme as unhesitatingly as a botanist would classify a plant. In the second place, it is clear that no one has ever proposed to apply the maxim so rigidly as to secure the absolute separation of the three departments of government.³ A system of "checks and balances" depends precisely on *not* placing all legislative, or all executive, or all judicial power in one department, and this must be regarded as a practically contemporaneous modification of the maxim which further detracts from its definiteness.

When the Declaration of Independence gave the colonies a free rein in determining how they would be governed, most of them promptly framed written constitutions with this maxim as the very foundation, and the Convention of 1789 followed them in this respect.⁴ The great merit of these constitution-makers as constructive statesmen consists in the fact that they devised a means of making checks and balances practically effective by making the

¹ *Spirit of Laws*, Bk. XI, Ch. VI. First published in 1748.

² MADISON, *Federalist*, No. 47.

³ MADISON, *Federalist*, No. 47.

⁴ HAMILTON, *Federalist*, No. 81.

judiciary department strictly co-ordinate with the others and independent of them. Nearly all the State constitutions have provided in varying terms that the powers of government shall be vested in three separate and distinct departments.¹ Massachusetts words the provision as follows:

"In the government of this Commonwealth the legislative department shall never exercise the executive and judicial powers, or either of them; the executive shall never exercise the legislative or judicial powers, or either of them; the judicial shall never exercise the executive or legislative powers, or either of them; to the end that it may be a government of laws and not of men."²

This is retained from the Declaration of Rights of 1780, and in its time must have been very striking language. Another somewhat typical form of the statement is that found in the Constitution of Indiana:³

"The powers of the government are divided into three separate departments: the legislative, the executive, including the administrative, and the judicial; and no person charged with official duties under one of these departments shall exercise any of the functions of another, except as in this Constitution expressly provided." The Constitutions of the United States and of the States of New York, Pennsylvania, Delaware, Ohio, Wisconsin, Kansas and North Dakota have no formal provision of this sort, but, like all the rest, their principal articles begin with, "The legislative power shall be vested," "The executive power shall be vested," "The judicial power shall be vested;" and it is clear, both on reason and authority, that this enjoins the separation of the departments just as imperatively as the express mandate. It may be taken as settled in American constitutional law that all legislative power is vested in the legislature, and all judicial power in the courts, except as otherwise expressly provided in the several constitutions.⁴

¹ For citations, see 1 Stimson, *American Statute Law*, 39.

² Declaration of Rights, Art. XXX. ³ Art. III, Sec. 1.

⁴ Letters of JAY, C. J., and others, to President WASHINGTON, printed in 2 Dall., 410 n.; *Marbury v. Madison*, 1 Cranch, p. 67; *Kilbourn v. Thompson*, 103 U. S., 168; *Cooley, Constitutional Limitations*, No. 88, No. 174.

Difficulties arise not so much in construing the constitutional exceptions to the principle as in determining what acts are legislative and what are judicial. Formal definitions are numerous enough, but not very satisfying where the question is doubtful.

"A marked difference exists between the employment of judicial and legislative tribunals. The former decide upon the legality of claims and conduct, and the latter make rules upon which, in connection with the Constitution, those decisions should be founded. It is the province of judges to determine what the law is upon existing cases. In fine, the law is applied by the one and made by the other. To do the first, therefore, to compare the claims of the parties with the law of the land before established, is, in its nature, a judicial act. But to do the last, to pass new rules for the regulation of new controversies, is, in its nature, a legislative act."¹

"The difference between the departments undoubtedly is that the legislative makes, the executive executes, and the judiciary construes the law."²

"The distinction between a judicial and a legislative act is well defined. The one determines what the law is, and what the rights of the parties are, with reference to transactions already had; the other prescribes what the law shall be in future cases arising under it."³

"The legislative power we understand to be the authority under the Constitution to make laws and to alter and repeal them. Laws, in the sense in which the word is here employed, are rules of civil conduct, or statutes which the legislative will has prescribed. On the other hand, to adjudicate upon, and protect the rights and interests of individual citizens, and to that end to construe and apply the laws, is the peculiar province of the judicial department."⁴

¹ Merrill v. Sherburne, 1 N. H., 204.

² MARSHALL, C. J., in *Wayman v. Southard*, 10 Wheat., p. 46.

³ FIELD, J., dissenting, in *Sinking Fund Cases*, 99 U. S., p. 761.

⁴ COOLEY, *Constitutional Limitations*, No. 90. For other definitions of like tenor, see *Ratcliffe v. Anderson*, 31 Gratt., p. 107; *Smith v. Strother*, 68 Cal., p. 196; *Denny v. Mattoon*, 2 All., p. 361; *Shepard v. Wheeling*, 30 W. Va., p. 482.

It is said, in an early Vermont case, that "no power can be properly a legislative and properly a judicial power at the same time ; and as to mixed powers, the separation of the departments in the manner prescribed by the Constitution precludes the possibility of their existence."¹ This may be true theoretically, but it seems to imply something more *a priori* and artificial than what we know our constitutions to be, and it will be found difficult to apply. The conclusion of a California court that there is a multitude of minor duties of a nondescript character which are not strictly legislative, or strictly executive, or strictly judicial,² is equally true. And dubbing these "administrative" does not much mend the matter, for it is at once obvious that this does not make a fourth department, but merely gives a name to a group of duties taken from the legislative and executive departments. Since the legislative department is the broadest in scope, and perhaps corresponds most nearly to the original depository of all the powers, it seems logical to leave to it the residuum, and say that everything not clearly executive or clearly judicial is legislative. And, in general, it is to be borne in mind that the question always is, not what is the etymological meaning of legislative and judicial, but what were in fact the functions of legislature and courts, respectively, at the time the Constitution in question was framed.³

It will be more profitable to ascertain what is the practical interpretation given to the terms in cases where the courts have been obliged to determine whether the principle of the division of powers has been violated. There was at first a tendency to run to the legislature for a special dispensation in the way of an appeal or a new trial, or a suspension of a troublesome statute, when existing laws seemed to have left a "hard case" stranded, and it took some time to make it thoroughly understood that any such dispensation was wholly inconsistent with the co-ordinate position of the judiciary. Soon after the organization of the Federal

¹ *Bates v. Kimball*, 2 Chip., 77. ² *People v. Provines*, 34 Cal., 520.

³ *Shepard v. Wheeling*, 30 W. Va., p. 482 ; *Copp v. Henniker*, 55 N. H.,

Supreme Court, a case came to it from Connecticut in which a statute granting an appeal out of time was attacked as unconstitutional.¹ It was held that the act was not *ex post facto* or otherwise repugnant to the Constitution of the United States, and it was pointed out that while it was an exercise of judicial, not of legislative authority, Connecticut was still acting under her old charter, and judicial power was not forbidden to the legislature. The same question was raised early in Maine² and Vermont³, and it was decided that granting an appeal in a special case is an encroachment on the power of the judiciary, and is forbidden to the legislature. The other departments of the government have no control over judgments of the courts,⁴ save such as may be given them by the constitutional provisions concerning pardons.

And interference with the course of pending cases, before judgment, is equally forbidden. As has been said in a Massachusetts case:⁵ "If, for example, the practical operation of a statute is to determine adversary suits pending between party and party, by substituting in the place of the well-settled rules of law the arbitrary will of the legislature, and thereby controlling the action of the tribunal before which the suits are pending, no one can doubt that it would be an unauthorized act of legislation, because it directly infringes on the peculiar and appropriate functions of the judiciary. It is the exclusive province of the courts of justice to apply established principles to cases within their jurisdiction, and to enforce their decisions by rendering judgments and executing them by suitable process. The legislature has no power to interfere with this jurisdiction in such manner as to change the decision of cases pending before the courts, or to impair or set aside their judgments, or take cases out of the settled course of judicial proceeding."

Curative statutes, so-called, frequently give rise to very

¹ *Calder v. Bull*, 3 Dall., p. 398.

² *Lewis v. Webb*, 3 Greenl., 298. ³ *Bates v. Kimball*, 2 Chip., 77.

⁴ Story, Constitution, Sec. 1587; *Ratcliffe v. Anderson*, 31 Gratt., 105.

⁵ *Denny v. Mattoon*, 2 All., 361.

nice questions which it would carry us too far to consider here, but all the cases agree in this, that jurisdictional defects in *judicial* proceedings cannot be cured by subsequent legislation so as to render valid a judgment which would otherwise be void; for in such case the validity must come from the statute itself, and the legislature cannot render judgments.¹ Expository statutes are effective from date, being practically new enactments, but they cannot reverse decisions already made;² nor can they control the interpretation of the courts in dealing with causes of action already accrued.³ Pennsylvania courts were at first rather complainant toward legislative encroachments of this sort; but in *Greenough v. Greenough*,⁴ Chief-Justice GIBSON, after adverting to the fact that their former supineness in this regard had tended to destroy the balance between the departments in that State, emphatically declined to allow any retrospective force to a legislative interpretation of their Wills Act, purporting to apply to the wills of persons already deceased.

A particularly good illustration of the difference between legislative and judicial power is afforded by the somewhat common attempt to enlist the aid of the courts in organizing municipal corporations and changing their boundaries, the purpose obviously being to secure an impartial arbiter between the corporation and the property-owners concerned. Section 431 of the Iowa Code, for example, provides in substance that when a city desires to annex contiguous, platted territory, it may file a petition describing the land, naming the owners and attaching a plat; that the city shall be deemed the plaintiff and these owners defendants, and the further proceedings shall be as in other cases, as near as may be. If the Court finds that the territory is subdivided and contiguous, and that justice and equity require the admission of all or any of it,

¹ *Maxwell v. Goetschius*, 40 N. J. L., 383; *Houseman v. Kent*, 58 Mich., 364.

² COOLEY, *Constitutional Limitations*, No. 94.

³ *Ogden v. Blackledge*, 2 Cranch, 194; *Holden v. James*, 11 Mass., 396.

⁴ 11 Pa. St., 489.

a decree shall be granted accordingly, and it is annexed. In the case of the City of Burlington *v.* Leebrick,¹ the constitutionality of the act was drawn in question, but the Court held that there were definite issues presented and that the determination of them was so far judicial in character that it might be referred to the courts. Nebraska has a similar statute, following a little more closely the usual forms of litigation by providing for personal service on defendants by the sheriff, instead of notice by publication as in Iowa, and the decision in City of Burlington *v.* Leebrick has been followed.²

Kansas has a statute³ providing, less formally, that a city of the second class, desiring to annex unplatted, adjacent territory, may present a "petition" to the judge of the district court, describing the territory "and asking said judge to make a finding as to the advisability of adding said territory to said city." "Upon said petition being presented to said judge, with proof that notice of the time and place said petition shall be so presented has been published for three consecutive weeks in some newspaper published in said city, he shall proceed to hear testimony as to the advisability of making such addition; and upon such hearing, if he shall be satisfied that the adding of such territory will be to its interest, and will cause no manifest injury to the persons owning real estate in the territory sought to be so added, he shall so find; and thereupon the city council of said city may add such territory to said city by an ordinance providing for the same." This was attacked as conferring legislative power on the judiciary, but the court balanced off the authorities on the point and said, as it had been held both ways, the action could not be so clearly unjudicial as to warrant them in overthrowing the statute.⁴

Kansas also has a statute,⁵ providing that when a city

¹ 43 Ia., 252 (1876).

² City of Wahoo *v.* Dickinson, 23 Neb., 426 (1888).

³ Compiled Laws, 1889, Sec. 884.

⁴ Callen *v.* City of Junction City, 42 Kan., 627 (1890).

⁵ Compiled Laws, 1889, Section 552.

of the first class desires to enlarge its limits it shall describe the proposed new boundary by ordinance, and, within twenty days, publish it in the official city paper; and the mayor, at the next term of the district court, shall present to said court a copy of the ordinance with proof of publication. "Thereupon said court shall determine whether said publication has been made as herein required, and shall then consider said ordinance, and by its judgment either approve, disapprove or modify the same, first hearing all objections, if any, and proofs, if any, offered by said city or persons affected by said ordinance. Should said ordinance be approved or modified by said court, then the limits or area of said city shall be enlarged or extended; as therein designated, from the date of such approval or modification. But, should it be disapproved entirely, then the limits or area of the city shall remain unaffected by such proceedings; but should the same be approved entirely, or modified and approved, the judgment of said court shall stand, and the limits of such city shall be extended, as is in said judgment specified, and the determination of the matter thus submitted to said court shall be final, and all the courts of the State shall take judicial notice of the limits or area of such city, as thus enlarged and extended, and of all the steps in the proceedings leading thereto." This was also challenged as unconstitutional on the same ground, but it was held that the power therein conferred on the district court is "judicial," within the decision in the preceding case, and that the statute is valid.¹ The point was again raised, and again decided the same way and on the same ground, the last decision not even being referred to.² Nor in any of these cases was any notice taken of an early Kansas decision, in which the Court went a little out of its way to hold that similar authority, then conferred on the probate court, was judicial.³ The precise question as to whether such functions, if delegated by the Legislature, could be delegated to

¹ *Huling v. City of Topeka*, 44 Kansas, 577 (1890).

² *Hurla v. City of Kansas City*, 27 Pac. Rep. (1891).

³ *Kirkpatrick v. State*, 5 Kansas, 673 (1868).

courts, was not very distinctly raised and no authority was cited on the point. The first Kansas case did cite, in addition to the Iowa and Nebraska decisions, as supporting the conclusion there reached, *Blanchard v. Bissell*,¹ *Kayser v. Trustees of Bremen*,² and *Borough of Little Meadows*.³ Of these the first is not in point at all, because there the council petitions the county commissioners, whose functions are primarily political. The others are briefly and unsatisfactorily reported, but it appears from the Missouri case that a petition was presented to the Court, and if it found certain facts to be as therein set forth, the town was to be declared incorporated, regardless of the Court's personal opinion as to the expediency of it. This proceeding is said to be judicial. From the Pennsylvania case it appears that it was the practice to refer the petition for incorporation to the Grand Jury, who reported to the Court of Sessions as to the truth of the facts alleged therein, and the Court confirmed the report if favorable. In that particular case it was held simply that the corporation laws did not authorize the Court to include several farms with a straggling hamlet and call it a village, and the question as to whether courts could rightfully exercise such functions in any case was not at all considered. Moreover, the "Court of Sessions" in that State seems to designate "the tribunal transacting county business," and to be, like the Board of County Commissioners of other States, rather an administrative than a judicial body.

These three cases, therefore, seem not to afford a very secure foundation for a decision that needs authority to rest on, and it seems safe to assume that the Iowa, Nebraska and Kansas decisions will be generally regarded as out of harmony with the principles heretofore laid down as settled. The real nature of the proceedings is, perhaps, more apparent in the Kansas cases, because they masquerade less in the guise of an ordinary lawsuit. What really determines the action of the Court in all the cases is the judge's personal opinion as to the *expediency* of including certain territory, for the future, in a particular political subdivision.

¹ 11 O. St., 96.

² 16 Mo., 88.

³ 35 Pa. St., 335.

The findings as to platting, and contiguity, and notice, are a mere preliminary. If the conditions under which annexation is allowable are not present, the Court cannot act at all; but if the necessary conditions are shown to exist, they do not at all control the action of the Court. This phase of the matter receives comparatively little notice in the opinions, while the preliminary findings are emphasized as if the courts were sure that so much, at least, is judicial. It is said in the Iowa case "that it is not the sole province of courts to determine what the existing law is in relation to some existing thing already done or happened. It is as much a judicial act to determine what are the facts of a particular case, and whether they bring the case within the operation of a recognized principle of the existing law." True enough; but that is not the same thing as saying that it is a judicial act to determine what are the facts of a particular case, and whether they make it advisable to enact a new law. Determining facts is judicial only as it is a necessary incident to rendering judgment according to an existing law. There is nothing judicial about determining, as an abstract question, when Columbus discovered America, or in determining it for the purpose of enabling Congress to decide when the World's Fair, in commemoration of the event, ought to begin. One required to ascertain the facts of a particular case without the power to render a judgment therein reviewable only according to established law, is a commissioner, not a judge, however closely he may follow judicial forms.¹

And it is an abuse of terms to call the question whether justice and equity require the annexation of certain territory a judicial one because it calls for judgment and discretion. All legislative and most executive acts require the same.² Besides, it is only the political department of the government that has the privilege of considering the abstract justice and equity of its acts. "Justice and equity," for the courts, mean merely conformity to law, and one might easily fail to realize how radical a departure from

¹ *United States v. Ferreira*, 13 How., 40; 1 Kent, 297 n.

² *Auditor v. A. T. & S. F. R. R. Co.*, 6 Kan., 500.

Anglo-Saxon methods it is to leave the determination of them in any other sense to the judges. It is throwing away the fruits of a victory which it took a thousand years to win, and abandoning the attempt to secure a government of laws and not of men.

The determination of how the State shall be subdivided for the purposes of local government is pre-eminently legislative. The warrant for delegating it to political officers, like county commissioners and city councils, is in many constitutions slender enough. It is frequently implied, rather than expressly stated, local self-government being apparently so fundamental an assumption that it did not occur to anyone as being necessary to insert in the Constitution a formal declaration that it is to be retained.¹ But there is no ground for implying any kind of local management except such as was then customary, and certainly a legislature must find express warrant to justify it in requiring the *judiciary* to pass on the expediency of incorporating territory. Clearly a mere veto power is legislative in character, but the courts in the cases in hand have much more than this. The matter rather comes before them in the shape of a committee report, which they may adopt, reject, or amend to suit themselves.

In the Nebraska case, and in the first of the three recent Kansas decisions, the courts make much of the fact that the effect of the proceeding is to anticipate litigation and avoid a multiplicity of suits. It is said in the latter, for example : "To avoid separate suits of this character by individual landowners, and before property interests are affected and perplexing complications arise, this section provides for a determination of the rights of all the parties in one action.

"The practical effect of this statute is to submit to the district judge, in advance of its enactment, the question of the legality of the city ordinance."²

The novelty of this very desirable consummation might well have aroused some misgivings as to its regularity. To allow the judiciary a decision on the validity of a law before

¹ COOLEY, Constitutional Limitations, No. 191.

² Callen v. City of Junction, 43 Kan., p. 633.

it has involved a wrong to any would give the judiciary an absolute veto upon the legislature,¹ and the people no more want the judiciary than the legislature supreme. In fact the supremacy of the judiciary would be much the worse evil ; for the people might in a few months undo the results of legislative mistake or perversity, while the decrees of a judicial oligarchy might be remediless.² Moreover, neither the legislature nor individuals are at liberty to take up the time of the courts with mere legal conundrums, and judicial deliverances on matters not in litigation settle them, if at all, not by furnishing a proper precedent, but by committing the judge.³

The findings, then, as to justice and equity, as the terms are used in these statutes, could not be "judicial" under any circumstances, and the findings as to platting, contiguity and notice are not judicial in these cases, because they are not made with a view to determining "whether they bring the case within the operation of a recognized principle of the *existing* law."

If these conclusions are sound in theory, they are also abundantly supported by authority. A similar statute came before the Supreme Court of Illinois in the case of *City of Galesburg v. Hawkinson*,⁴ and that Court said : "Whether cities, towns or villages should be incorporated, whether enlarged or contracted in their boundaries, presents no question of law or fact for judicial determination. It is purely a question of policy to be determined by the legislative department." It was further pointed out that while courts may determine what are the corporate limits already established, whether they are as claimed, whether authority has been exceeded, etc., all this implies an existing law ; but here the question presented is, what *shall* the law be as to boundaries, and the decree is the answer. A legislature may not set aside a judgment, but no one would deny that it might the next moment change city boundaries as fixed by such a decree.

¹ MULFORD, *The Nation*, 205.

² WOODBURY, J., dissenting, in *Luther v. Borden*, 7 How., p. 52.

³ COOLEY, *Principles of Constitutional Law*, 139.

⁴ 75 Ill., 152 (1874).

A Minnesota law of the same sort authorized the Court to declare incorporated so much of the described territory as justice might require, if it was satisfied that the interests of the inhabitants would be promoted. The Supreme Court say it is too clear for argument that the determination of such questions involves the exercise of purely and exclusively legislative power.¹ The Supreme Court of Michigan, speaking of the same matter with reference to a somewhat different statute, say : "Such a determination, wherever made, belongs to policy rather than law, and is political and not judicial. Any confusion which has been discovered in the authorities has arisen from the use of the term "judicial" in more than one sense, and in applying it sometimes to all acts involving discretion and judgment, instead of confining it to the "judicial power" which belongs to courts of justice, and relates to controversies on questions of public or private right."² It has been held in California that the propriety of including land in a municipality is, in general, a political question for the legislative department;³ and in New York, that the action of supervisors in incorporating towns is legislative.⁴

A California decision, to the effect that the governor, surveyor-general, and State engineer could not be made commissioners to divide the State into drainage districts and organize them as such, because this was a legislative function and, if delegable at all, not delegable to executive officers,⁵ would seem to be entirely analogous in principle to these corporate limit cases.

The Legislature of West Virginia went beyond all the statutes so far referred to by providing, generally, that on petition of ten resident taxpayers a Circuit Court might "supersede, revoke and annul . . . any ordinance of a city, town or village, made contrary to law."⁶ This was held bad, as being an obvious grant of legislative power to

¹ *State v. Simons*, 32 Minn., 540 (1884).

² *Shumway v. Bennett*, 29 Mich., 451 (1874).

³ *People v. City of Riverside*, 70 Cal., 461 (1886.)

⁴ *People v. Carpenter*, 24 N. Y., 86 (1861).

⁵ *People v. Parks*, 58 Cal., 624 (1881).

⁶ *Shepard v. Wheeling*, 30 W. Va., 479 (1887).

the Courts. Annulling ordinances made contrary to law superficially bears more resemblance to judicial action than passing ordinances in the first instance, but they are alike legislative acts. To apply the doctrine of this case to the annexation of territory: if it would be legislative, on the petition of ten taxpayers having no special grievance to *annul* an annexation ordinance made contrary to law, *a fortiori* is it legislative, on petition of a city not claiming any infraction of its rights under existing laws, *to enact* what, if passed in the same terms by a legislative body, would be an annexation ordinance.

This case also calls attention to a common misapprehension as to the effect of a judicial decision as to the constitutionality of a law. Courts are frequently said to declare laws unconstitutional *and void*, and their language, it must be admitted, frequently takes that form. But, as is here pointed out, what they really do is to ignore a statute that is considered unconstitutional, and decide the case in hand as if the statute did not exist. The Act is not stricken from the statute book, and it is not superseded, revoked, or annulled. If the courts afterward change their minds, as did the Supreme Court of the United States in the legal tender cases, the statute is just as effective as if it had never been pronounced unconstitutional. As was said in an Ohio case: "The general and abstract question, whether an act of the legislature be unconstitutional, cannot with propriety be presented to a court; the question must be whether the act furnishes the rule to govern the particular case."¹ For this reason it is eminently appropriate that the legislature, if it acquiesces in the decision, should repeal such acts, as was in fact sometimes done² when for the courts to hold laws unconstitutional was a new thing.

It has been held in Tennessee that the *creation* of corporations is a legislative matter which could not be delegated to the courts even if the Constitution were silent in regard to it.³ As, however, their Constitution authorizes

¹ Foster v. Commissioners, 9 O. St., 543; Relation of the Judiciary to the Constitution, 19 American Law Review, 175.

² 19 American Law Review, p. 188.

³ State v. Armstrong, 3 Sneed, 634.

the legislature to grant to the inferior courts such powers with regard to private and local affairs as may be deemed expedient, they may be empowered to "*organize*" corporations; but they then act ministerially, not judicially, and no appeal lies from a refusal to organize.¹ These rulings are with immediate reference to business corporations, but the reasoning would seem to apply with even greater force to municipal corporations.

It would seem, therefore, that the considerations of reason and policy in favor of placing the regulation of municipal boundaries in the hands of the judiciary, ought to be more weighty than we have found, in order to justify a court in passing by these authorities to follow the Iowa, Nebraska and Kansas decisions. Moreover, the statutes there passed upon are not so nearly alike as they appear to have been considered. In Iowa there is no provision for the enactment of an ordinance by the council at any stage of the proceedings; under the Kansas statute last mentioned, an ordinance is the first thing, but from an examination of the statute as a whole, it is clear that the "judgment" of the court, not the ordinance, is ultimately to determine the status of the territory concerned. In Nebraska, on the other hand, and in Kansas under the second-class city act, the annexation is consummated by an ordinance to be passed after it has received judicial approval. It is not impossible that these ordinances might be held effective to annex the territory, even if the action of the Court in the matter were held to be unauthorized and wholly nugatory. No notice is taken of the distinction in any of the cases, and the opinions show that it was the intention to go the whole length in sustaining the action of the courts as judicial. An appeal is provided for in both instances. But in the Kansas statute it is from the judge of the District Court to the District Court, and as in that State the District Court consists of one judge, this seems to give a right rather less valuable than an "appeal from Philip drunk to Philip sober;" for in this instance Philip is presumably sober on both occasions, and there is no pro-

¹ *Ex parte Burns*, 1 Tenn., Ch. 83; *ex parte Chadwell*, *id.*, 95.

vision as to what would be the reward of a successful appeal if, in the meantime, the council had passed its ordinance. In fact an appeal is an absurdity where the question is as to the opinion of an individual as to the advisability of annexing territory. In the nature of things it can not be tried. This suggests the query whether leaving to the arbitrary will of a judge interests of citizens so important as the subjection of their property to the burdens of city government would be "due process of law" and the "equal protection of the laws" which everyone may claim, even if leaving the matter to a judge were otherwise objectionable.¹

The Iowa case was decided with only the inconclusive Pennsylvania decision previously referred to before it; the Nebraska judges ignored the Michigan case of *Shumway v. Bennett* because the statutes were different, and deliberately followed *City of Burlington v. Leebrick* in preference to *City of Galesburg v. Hawkinson*. Probably there was no oral argument in any of the Kansas cases, and none of them purport to go very fully into the matter as an original question.

There are numerous decisions of a miscellaneous character, which further illustrate the relation between legislatures and courts; but in considering these it is to be noted that in many constitutions there is express provision for certain mixed tribunals, in some of which the judicial, and in others the administrative element is the more prominent. Thus, some of the lower courts may be authorized to exercise some non-judicial functions; or the board of county commissioners, or supervisors, or whatever the corresponding officers may be called, may be vested with some judicial powers. It is only decisions that do not seem to turn on any peculiar provision of this sort that will be valuable on the general question.

A statute authorizing the parties to agree upon a member of the bar of the Supreme Court to try a case in which the judge is interested, is void. The attorney selected would not be a judge, and the legislature cannot vest judi-

¹ See *Yick Wo v. Hopkins*, 118 U. S., 356; *Shumway v. Bennett*, 29 Mich., 451.

cial power in any one else.¹ "It is as incompetent for the legislature to confer the power to tax upon the judiciary as upon the executive."² The legislature cannot require the Supreme Court to give its opinions in writing, because writing out the reasons for their decisions is not judicial,³ or require it to prepare the syllabi for the reports,⁴ or require courts to appoint surveyors.⁵ It seems that it may provide for commissioners to "assist" the Supreme Court, taking care not to authorize them to *decide* anything.⁶ On the other hand, legislative divorces seem to be bad on principle. Decisions the other way generally proceed on an established usage which it is scarcely practicable to overthrow.⁷

There is a dictum in a recent Pennsylvania case to the effect that admitting attorneys to practice is a judicial matter, and that the Legislature may not *order* admission on compliance with certain requirements.⁸ A recent New York law provides that the Supreme Court or county judge may, on the application of the local authorities, order a flagman or a gate to be maintained at railroad crossings, first giving notice to the company; and the Supreme Court has held, one judge dissenting, that this is a mere provision for determining the necessity, and not a delegation of legislative power.⁹ One is inclined to say that the former case is probably, and the latter certainly, wrong, unless they have some special constitutional warrant not referred to in the opinions.

It was said in a Kansas case that the action of the Board of County Commissioners, in rejecting a claim against the county, is so far judicial that an appeal may be taken,

¹ Van Slyke v. Insurance Co., 39 Wis., 390.

² Munday v. Rahway, 43 N. J. L., p. 348, quoting COOLEY, Taxation, 34.

³ Houston v. Williams, 13 Cal., 24. In a very emphatic opinion by Justice FIELD.

⁴ *Ex parte* Griffiths, Ind., 83.

⁵ Houseman v. Kent, 58 Mich., 364.

⁶ People v. Hayne, 83 Cal., 111; Railroad Co. v. Abilene Town Site Co., 42 Kan., 104. State v. Noble, 118 Ind., 350, is *contra*.

⁷ COOLEY, Constitutional Limitations, No. 113.

⁸ Petition of Splane, 123 Pa. St., 527.

⁹ People v. Railroad Co., 12 N. Y. Sup., 41.

but not so far judicial as to make the matter *res judicata* if the appeal is not taken.¹ It has since been held that the action is not judicial, but the appeal is still allowed.² Since the statute giving the "appeal"³ provides for notice to the county, possibly it may be said that appeal is not used in the technical sense, and this is merely a special "way of getting into court." It is clear that appeals, in the proper sense of the term, lie only from the action of a tribunal clothed with judicial authority, and acting in a judicial capacity.⁴ A statute also provides for an appeal from the commissioners' award of road damages, to be taken "upon the same terms, in the same manner, and with like effect as in appeals from judgments of justices of the peace in civil cases."⁵ The language here excludes any fiction about a special way of getting into court, and if the appellee was not already in court, there is no provision for service at all. The judiciary article of the Constitution authorizes the legislature to create courts inferior to the Supreme Court,⁶ and the legislative article provides that "the legislature may confer upon tribunals transacting the county business of the several counties such powers of local legislation and administration as it shall deem expedient."⁷ But both the language and the position of this clause seem to forbid reading into it authority to confer *judicial* power on the tribunal transacting the county business, and it would seem that an express permission of this sort is indispensable to justify making a political body also a court under the other section. Calling the action of county commissioners in such cases "quasi-judicial"⁸ is not meeting the point, and as an original question, it would seem that there is no authority for vesting judicial power in the commissioners in any case, and that therefore their decisions are not appealable.

¹ Commissioners v. Keller, 6 Kan., 307.

² Gillett v. Commissioners, 18 Kan., 410.

³ Compiled Laws, 1889, Sec. 1649.

⁴ Story, Constitution, 1761.

⁵ Compiled Laws, 1889, Sec. 5480.

⁶ Art. III, Sec. 1.

⁷ Art. II, Sec. 21.

⁸ County of Leavenworth v. Brewer, 9 Kan., p. 319; Fulkerson v. Commissioners, 31 Kan., 126.

There remains the question whether non-judicial functions, which may not be imposed on the courts as such, may yet be imposed on the judges as individuals. The question, of course, does not arise where, as is frequently the case, the Constitution provides expressly that persons exercising functions properly pertaining to one department shall not exercise those pertaining to any other. And it is difficult to discover any justification for such a subterfuge where this is not done. It does not at all avoid the reasons of policy which dictate the separation of the duty of making laws from that of expounding them. To litigate the constitutionality of a law before the legislature which passed it, or before a judge who had given it his approval before its enactment, would be unsatisfactory, not because of anything that pertains to the officers as such, but because of what pertains to them as men. Yet when, in 1793, the United States Circuit Courts were directed to examine into pension claims and report to the departments, while all agreed that the duties required were not judicial, and therefore could not be performed by them as courts, yet there was some difference of opinion at first as to whether the judges might not, outside their judicial duties, perform the services as commissioners. The first case under the Act went off on the ground that this was an unwarrantable construction of the statute,¹ but a little conference between the judges led them to the conclusion that the Constitution would not warrant it, if the statute did.

Long afterward the appointment of supervisors of congressional elections by the circuit judges, on a petition from voters, was opposed by certain citizens of Cincinnati as unconstitutional on this ground, but the duty was held to be judicial.² The judge added that if the Act directed him to act personally as supervisor, he would decline to obey it. It was also pointed out that the Constitution of the United States authorizes Congress to vest the appointment of subordinate officers in the courts of justice,³ and the statute was construed as giving the power to the Court.

¹ Hayburn's Case, 2 Dall., 409, 410 n.

² *In re* Citizens of Cincinnati, 2 Flap., 228.

³ Art. II, Sec. 2.

The action seems not to be judicial except in the sense that it is thus authorized to be performed by a court; and under a similar State law it was held in Massachusetts that the court could not act because the appointment was not judicial, and the judges could not act because the Constitution expressly forbids them to hold such an office.¹ But these decisions do not go very far toward determining whether they might make such appointments under a Constitution which does not forbid them to perform other than judicial duties except by assigning the powers of government to a legislature, an executive and a judiciary.

It has been said in California that a police judge may be made *ex officio* police commissioner, because the three departments which the Constitution requires shall be kept separate are the departments of the State government, and the legislature may mix powers in the local government, which it is to establish, as much as it pleases.² This is certainly untying the knot by cutting it. The whole history of the doctrine, and the whole practical application of it elsewhere, forbids such an interpretation. There seems to be nothing peculiar in the Constitution of California to justify it, and it does not reassure one as to the correctness of the decision to find that it calls the appointment of policemen a judicial act, or if not strictly so, not so clearly executive or legislative as to be forbidden to the judiciary department.

It has been held allowable from early days in Kansas to impose other than judicial duties on the Probate Judge. In passing upon a portion of the liquor law of that State, which provides for the issue of "druggists' permits" by the Probate Judge, the correctness of these decisions was questioned, but it was thought then the less evil to follow them.³ It is said that the effect of the statute is to create the office of commissioner of licenses, and provide that it shall be filled by the person occupying the position of Probate Judge. It is also suggested that the earlier decisions

¹ Case of Supervisors, 114 Mass., 247.

² People v. Provines, 34 Cal., 520.

³ Intoxicating Liquor Cases, 25 Kan., 751.

are somewhat countenanced by the fact that the judges of the Supreme and District Courts, but not the judges of the Probate Courts, are expressly forbidden by the Constitution to hold other offices of trust or profit. If, however, this would be forbidden without an express prohibition, the omission of a prohibition cannot amount to a grant. In an earlier case there is an enumeration of the somewhat curious jumble of duties at that time given to the Probate Court or Probate Judge, with a *caveat* as to the constitutionality of such as had not been adjudicated, and a dictum to the effect that the non-judicial functions could not be forced on the judge against his will.¹ To allow him to act or not, as he chose, would not be very satisfactory as a practical matter, and it would be anomalous for any one in the State to be at liberty to disregard a law unless it is void.

But there is a class of cases much more satisfactory than any of these, which negatives completely the right of a legislature to impose extra-judicial duties on the incumbents of judicial offices, without express constitutional warrant. These are the decisions in regard to the right of the other departments of government to call for the opinions of the justices of the Supreme Court on questions of law. The practice, so far as it prevails here, is obviously modelled on that of the English House of Lords, in accordance with which the judges are called upon to give the House their opinion on feigned cases, and nothing is clearer than that these opinions are not binding, and therefore not judicial. About the time the Federal judges had under consideration the question as to their duty under the Pension Act before referred to, President WASHINGTON made a formal request for the opinion of the justices of the Supreme Court on various questions of international and maritime law, and they finally declined to give them,² taking the ground that under the Constitution "neither the legislative nor executive branches can constitutionally assign to the judicial any duties but such as are properly judicial, and to be per-

¹ *In re Johnson*, 12 Kan., p. 104.

² For an account of this correspondence, see 4 *American Jurist*, 293.

formed in a judicial manner."¹ The case of the United States *v.* Todd² is a decision going practically to this length, and it, with the refusal of the justices, has been accepted as settling the matter under the Federal Constitution. That under such circumstances the judges act merely as advisers to the other departments is the natural inference from the origin of the practice, and such has generally been the conclusion of the State as well as the Federal judges.³ Some half dozen States have provisions in their constitutions authorizing the other departments to call on the judiciary for such opinions. New York, Vermont and Minnesota have statutes purporting to give like authority, but Minnesota has held hers unconstitutional,⁴ and one would expect the same decision with regard to the others if they were contested.

The conclusion seems to be that the definitions which seemed so meagre and insufficient are both accurate and complete. The Federal Constitution describes the judicial power of which it speaks, as extending to all cases in law and equity.⁵ Now, "a case is a controversy between parties which has taken shape for judicial decision,"⁶ and it is the whole of "judicial power," as the words are used in the constitutions, to hear and determine litigated *cases*, except as other matters may be strictly incidental to that. A hundred years of exposition has merely confirmed HAMILTON's original view of the matter. He says:⁷

"The executive not only dispenses the honors, but holds the sword of the community. The legislature not only commands the purse, but prescribes the rules by which the duties and rights of every citizen are to be reg-

¹ Letter of JAY, C. J., and others, to President WASHINGTON, concerning the pension matter, 2 Dall., 410 n. ² 13 How., 52 n.

³ Reply of the Judges, 33 Conn., 586; a paper on the Duty of Judges as Constitutional Advisers, 24 American Law Review, 369, collects the decisions, also collating in a note the questions submitted in the various States.

⁴ Application of the Senate, 10 Minn., 78. ⁵ Art. III, Sec. 2.

⁶ JOHN MARSHALL, in a speech in Congress, reported in 5 Wheat. App., 16; also in *Osborn v. U. S. Bank*, 9 Wheat., p. 819.

⁷ Federalist, No. 78.

ulated. The judiciary, on the contrary, has no influence over either the sword or the purse ; no direction either of the strength or of the wealth of the society, and can take no active resolution whatever. It may be truly said to have neither *force* nor *will*, but merely judgment, and must ultimately depend upon aid of the executive arm for the efficacious exercise even of this faculty. . . .

“This simple view of the matter suggests several important consequences: it proves incontestably that the judiciary is, beyond comparison, the weakest of the three departments of power ; that it can never attack with success either of the other two ; and that all possible care is requisite to enable it to defend itself against their attacks.”

With a full appreciation of the fact that enabling the judiciary to defend itself against the attacks of the other departments was the crowning feature of the Constitution he was commending, he called the courts of justice the bulwarks of a limited Constitution against legislative encroachments,¹ and pointed out the subordinate condition of the judiciary department as the defect which elsewhere has left constitutional limitations to the mercy of the legislature. That system which best preserves the independence of each department approaches nearest to the perfection of civil government and the security of civil liberty.² The courts are commissioned by the people to maintain this independence as completely as the nature of society and the imperfections of human institutions will permit, and to this end they must, with firmness, but with all due courtesy and forbearance, resist all legislative intrusion into their field, and with equal firmness and courtesy must they decline to exercise forbidden power when it is offered them. Encroachments from either side alike obscure the line, and no encroachment is so easy to oppose as the first.

Topeka, Kansas.

¹ Federalist, No. 78.

² Ratcliffe v. Anderson, 31 Gratt., 105.